REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO (OS) NO. 110/2005**

% **Date of Decision: 15th May, 2007.**

M/S MAURIA UDYOG LTD. ..... Appellant.
Through Mr. Ravi Gupta, Advocate.

versus

CORPORATION BANK & ORS. ..... Respondents
Through Mr. Adarsh B. Dial, Sr. Adv. with Ms. Sumati Anand, Advocate for respondent No.1.

CORAM:
HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA, CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

SANJIV KHANNA, J:

1. By way of present appeal, M/s Mauria Udyog Limited has challenged and questioned order dated 11th April, 2005 passed by the learned Single Judge dismissing the applications - IA Nos. 388/2005 and 564/2005 for an ad interim injunction under Order XXXIX, Rules 1 and 2, and IA No. 879/2005 under Order XXXX, Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code, for short) for appointment of a Receiver.

2. Facts in brief relevant for deciding the present appeal may be

noticed. The appellant had entered into a contract with M/s Lusamatex Maquinas Texteis, LDA Protugal for purchasing equipment and ancillary items mentioned in sale contract No. 245/2004 dated 21st April, 2004 for total sale consideration of EURO 2,20,000. Out of the said amount, EURO 22,000 was paid in advance and the remaining balance of EURO 1,98,000 was secured by an irrevocable letter of credit issued by Corporation Bank, respondent Nos. 1 and 2 herein. This letter of credit was opened on 1st June, 2004 and it's validity was upto 31st August, 2004.

3. It is the case of the appellant that the respondent No. 4, the seller had failed to send certificate of origin in respect of 17 items mentioned in the purchase order and, therefore, Corporation Bank should not have honoured the letter of credit and made payment to the seller, the respondent No. 4. It was submitted that in view of the discrepancy in the letter of credit and failure to issue certificate of origin, the goods remained detained at the port, resulting in heavy demurrage charges being levied and were ultimately auctioned by the customs/port authorities.

4. It may be relevant to state here that before filing of the suit on 17th January, 2005, the respondent Corporation Bank had already remitted the amount under the letter of credit to the negotiating bank on 10th January, 2005. To this extent, on the date the suit was filed,

it was already infructuous. Prima facie there are several circumstances which suggest that the appellant was aware that this payment had already been made. The real purpose and prospect of the suit was to prevent the respondent Corporation Bank from invoking bank guarantee issued in it's favour by the respondent No. 3 viz. State Bank of Bikaner and Jaipur. This bank guarantee came to be issued in favour of the respondent Corporation Bank on 29th November, 2004 as a counter guarantee for a sum of Rs.2,31,34,165/- including the amount covered by the letter of credit, which was issued by the respondent Corporation Bank in favour of the seller respondent No. 4. The said guarantee was issued by State Bank of Bikaner and Jaipur as the appellant had wanted a change and substitution of it's bankers and release of it's charged assets and guarantees executed by the appellant and others in favour of the respondent Corporation Bank in respect of credit facilities and for issue of the said letter of credit in favour of the respondent seller. Some of the relevant terms of the bank guarantee are reproduced below:-

> "a) The Guarantor guarantees and undertakes to make payment of amount that may become due to the Bank from the Mauria Udyog Limited under these guarantees & LCs issued by the Bank as particularised in Schedule-I hereto in accordance with this counter guarantee executed by the Guarantor

> in favour of the Bank.
> b) It shall be open to the Bank to call upon to Guarantor to make the payment when the amount becomes due to the beneficiary under the guarantee executed by the Bank and the guarantor shall pay the same within two working days from the date of receipt of such demand.
> c) The Guarantor shall not be entitled to raise any dispute regarding the amount payable to be paid or liability of the Bank in terms of the guarantee & LCs issued by the Bank on account of Mauria Udyog Limited.
> d) The Guarantor shall be bound to pay to the Bank within two working days of receipt of demand and without demur the amount demanded of the Guarantor in respect of the guarantee & LCs issued in the event o f they being invoked.
> e) XXXX
> f) XXXX
> g) The Guarantor undertakes to indemnify the Bank against all losses, damage, interest, charges, expenses etc. that the Bank may suffer or that may be caused to the Bank on account of the Bank Guarantees & LCs issued by the Bank on account of the Mauria Udyog Limited."

5. The said terms clearly show that the guarantee given by State Bank of Bikaner and Jaipur to the respondent Corporation Bank is unconditional. The said bank has agreed to make the payment as demanded without any demur and without questioning the right of the Corporation Bank. It is well settled that in cases of unconditional irrevocable bank guarantees like the present one, the courts do not grant interim stay or injunction unless a case of "egregious fraud" or

irretrievable injury/injustice, which constitutes special equity is made out. Egregious fraud is established when there is a clear fraud of which the bank has notice and the fraud is by the beneficiary who seeks to benefit by the said fraud committed by him. The fraud must be of a nature so as to vitiate the entire underlying transaction. (See BSES Limited versus Fenner India Limited and Another, 2006 (2) SCC 728 and other cases cited in the said judgment). It is also equally well settled that a bank guarantee is a separate and distinct contract from the main or the principal contract i.e. the contract between the beneficiary and the person at whose behest the guarantee was issued.

6. In this case between the appellant and the respondent, Corporation Bank, the latter had issued a letter of credit as per the instructions of the appellant in favour of the respondent seller. The said letter of credit was honoured and the payment was made before the suit was filed by the appellant. The respondent Corporation Bank has invoked the bank guarantee, the second contract, issued by State Bank of Bikaner and Jaipur for payment of it's dues. The guarantee is unconditional. The question raised is whether invocation of the bank guarantee should be stayed in view of well settled parameters as expounded by the courts in this respect.

7. The appellant submitted that the respondent Corporation Bank

is guilty of fraud. In this regard he referred to the statements and the averments made by the State Bank of Bikaner and Jaipur, the respondent No. 3 in their written statement. The said respondent in it's written statement has alleged that it was not aware about the discrepancies, the defects and disputes between the respondent Corporation Bank and the appellant with regard to payment of the letter of credit in favour of the respondent seller. These averments in the written statement filed by the State Bank of Bikaner and Jaipur to our mind do not make out a case of egregious fraud on the part of the beneficiary of the counter guarantee i.e. the Corporation Bank. If at all, it shows that the appellant had concealed certain facts from the State Bank of Bikaner and Jaipur. The beneficiary i.e. the respondent Corporation Bank cannot be denied and deprived of their contractual rights, well recognized by the Contract Act and legal decisions, from invoking the guarantee and encashing the same.

8. The contention of the learned counsel for the appellant that the respondent Corporation Bank, had contrary to law and the terms of the letter of credit, made payment to the respondent buyer and thus committed fraud is also without merit. It was submitted by the counsel for the appellant that the respondent buyer had failed to furnish documents including certificate of origin for the goods sold. The certificate of origin as furnished it was argued related to only

four items and no certificate of origin was furnished for the remaining balance 13 items. It was also stated that the respondent Corporation Bank did not inform the appellant that the respondent seller had subsequently furnished certificate of origin relating to 16/17 items. In this regard learned counsel for the appellant referred to the correspondence exchanged between the appellant and the respondent Corporation Bank.

9. It is admitted by both the parties that documents under the letter of credit were received by the respondent Corporation Bank on 12th August, 2004. There were discrepancies which were conveyed to the negotiating bank/respondent seller by letter dated 14th August, 2004 written by the respondent Corporation Bank. One of the discrepancies mentioned was relating to one crane for loading and unloading the dying machines, STAHLE winch capacity 2000 kg.year 1996. The respondent Corporation Bank has clarified that inspection test certificate issued by Bureau Veritas had certified that the goods had been inspected but the chartered engineer's certificate mentioned 17 items, against 16 items mentioned in the commercial invoice. The 17th item was the crane which was not specifically mentioned. This defect was rectified and after due rectification, documents were re-submitted to the respondent Corporation Bank on 25th August, 2004. After re-submission, the said defect was

removed. The appellant was aware that documents had been submitted for payment of the letter of credit, as is apparent from the letter dated 13th August, 2004. The appellant was also aware that there were some discrepancies that had been pointed out by the respondent Corporation Bank. It also appears that the appellant was aware that the documents were re-submitted by and on behalf of the respondent seller on 25th August, 2004 as is clear from an undated letter which was received by the respondent Corporation Bank on 27th August, 2004. In this letter it is specifically mentioned that the "beneficiary has submitted fresh documents in relation to the discrepant documents already received". The appellant further called upon the bank not to honour the documents as they were discrepant and contrary and not in conformity with the terms and conditions of the letter of credit. The respondent Corporation Bank has also explained that the noting dated 28th August, 2005 made by the Manager of the Corporation Bank that they were yet to receive revised/rectified documents was made, as the said manager was not aware that the documents had been received, though the appellant probably had knowledge of the same as is clear from the letter. However, subsequent letters written by the appellant dated 1st October, 2004 onwards, show that the appellant was aware and had knowledge that revised/rectified documents had been received but

the appellant kept on insisting that the letter of credit should not be honoured.

10. The appellant repeatedly asked the respondent Corporation bank not to honour the letter of credit. Later on the appellant wanted change in the terms and conditions of the letter of credit by requesting for delivery in the presence of the shipper or his authorized representative for which they would deposit EURO 1,00,000 immediately and the balance amount would be remitted within 60 days, subject to the goods being found complying with the contract. The said clause also required checking of the goods to the satisfaction of the appellant. Further the appellant stated that he was not required to pay demurrage/ container detention charges. These requests of the appellant were communicated to the respondent seller but were not accepted. In response, the respondent seller asked the respondent Corporation Bank to unequivocally and definitely state what was intended by open delivery. On being informed, the appellant vide letter dated 25th October, 2004, stated that open delivery means checking physical quantity and other qualities and on checking the machines and on being satisfied regarding performance of the machine as per the contract, they shall make balance payment within 60 days. It was further stated that demurrage/detention charges levied on the

container would be borne and paid by the respondent seller. Thereafter, the appellant was informed that the beneficiary had confirmed that it shall stand by the earlier proposal and not deviate from the same.

11. There was some correspondence exchanged by the parties but the respondent Corporation Bank referred the matter to the International Chamber of Commerce, who vide their opinion dated 31st December, 2004, advised the respondent Corporation Bank to make payment as the corrected documents had been received within the stipulated period i.e. before the expiry of the Letter of Credit. Accordingly the payment was made.

12. We do not think any error can be found in the action and conduct of the respondent Corporation Bank. If at all the said bank was obliging and going out of the way to hold and delay payment under the letter of credit. It is well settled that banks should not delay payment under the letter of credit and a letter of credit once invoked should be normally honoured. Letters of Credit have been referred to as life lines of international industrial trade and commerce. Interference by the courts, unless an exceptional case of fraud etc. is made out, should not be resorted to. The Supreme Court in the case of ***Federal Bank Limited versus V.M. Jog Engineering Limited and Others***, reported in AIR 2000 SC 3166

has examined importance of letter of credits and the reason why courts are reluctant to grant injunction orders. Reference was also made to Uniform Customs and Practices (UCP, for short) for documentary credit, which are deemed to be incorporated into every documentary credit if the said words are used in the document itself. The said rules relating to contents of certificate of origin provide as under:-

> "**Contents of certificates of origin**
>
> **198**. The certificate of origin must appear to relate to the invoiced goods. The goods description in the certificate of origin may be shown in general terms not inconsistent with that stated in the credit or by any other reference indicating a relation to the goods in a required document."

13. In view of the above, the conduct of the respondent corporation cannot be faulted with in honouring and making payment of the letter of credit.

14. The contention of the appellant that the letter of origin had only four items, has been rightly rejected by the learned Single Judge. It has been pointed out that the said items are mentioned on last page of the documents, which were sent to the respondent Corporation Bank. The first page consists of 13 items. The learned Single Judge has recorded that the appellant had not come to the Court with clean hands.

15. For the reasons given above and by the learned Single Judge in the impugned order, we do not find any merit in the present appeal and the same is dismissed. The respondent Corporation bank will also be entitled to costs which are assessed at Rs.10,000/-.

(SANJIV KHANNA)
JUDGE

(DR. MUKUNDAKAM SHARMA)
CHIEF JUSTICE

MAY 15, 2007.
VKR/P